

McMillan Law Group

Julian McMillan, Esq. (SBN: 241937)
Alan Shepard (SBN: 292590)
2751 Roosevelt Rd., Suite 204
San Diego, CA 92106
Phone: 858-499-8951
Fax: 619-241-8291
Julian@mcmillanlawgroup.com
Alan@mcmillanlawgroup.com

Attorneys for Plaintiff Zxelan Richard Bonn

UNITED STATES BANKRUPTCY COURT

Southern District of California

In re

Zxelan Richard Bonn

Debtor/Plaintiff.

Zxelan Richard Bonn,

Debtor/Plaintiff,

-v-

Sallie Mae, Inc, National University, and
Educational Credit Management Corporation,

Defendant.

Case No.: 11-08757-PB7

Adv. Proc. No.: 11-90413-PB

**DEBTOR'S OPPOSITION TO SALLIE
MAE, INC.'S MOTION TO DISMISS
SALLIE MAE INC. AS A PARTY
DEFENDANT**

Hearing Date: May 12, 2014

Time: 10:00 AM

Dept: 4

Debtor Zxelan Richard Bonn ("Mr. Bonn" or "Plaintiff") opposes Sallie Mae, Inc.'s
("Sallie Mae") Motion to Dismiss Sallie Mae Inc. as a Party Defendant and submits the
following Memorandum of Points of Authorities in support of his opposition.

///

///

///

I. Introduction and Procedural Posture

Plaintiff seeks a determination that the payment of his student loans would impose an undue hardship under 11 U.S.C. § 523(a)(8). Plaintiff filed an Amended Complaint naming Sallie Mae as a creditor and defendant on September 7, 2011. (Docket No. 8.) Plaintiff's Amended Complaint alleges that Sallie Mae is a necessary party because it is the servicer and holder of the student loans. (Am Compl. ¶¶ 22, 32, 44.) Plaintiff requested an entry of default against Sallie Mae, but the request was denied without explanation.

Sallie Mae filed a motion to dismiss on August 13, 2012, nearly a year after being served with the summons and Complaint. (Docket No. 169.) This Court took the matter under submission, but on March 21, 2014 the Court decided not to rule on the matter. (Docket No. 271.) Sallie Mae brings the same motion again.

Because Sallie Mae is an indispensable party and there is a factual dispute over whether Sallie Mae is a holder of the student loans, this Court cannot rule on Sallie Mae's Motion to Dismiss as a matter of law. Plaintiff respectfully requests that this Court must dismiss the Sallie Mae's Motion to Dismiss Sallie Mae as a party.

II. Argument

A. Applicable Legal Standard

Sallie Mae brings its "Motion to Dismiss" under FRCP 21, not FRCP 12. FRCP 21 applies to misjoinder of parties. FRCP 21 allows the Court to dismiss dispensable parties. *See Fritz v. Am. Home Shield Corp.*, 751 F.2d 1152, 1154 (11th Cir. 1985). A motion to dismiss must be brought timely and must not cause prejudice to the parties. *See Atwood v. Pac. Mar. Ass'n*, 432 F. Supp. 491, 493 (D. Or. 1977) *aff'd*, 657 F.2d 1055 (9th Cir. 1981) (holding that it would unfairly prejudice the parties to dismiss a party 2 years after commencement of the action.) Sallie Mae misstates the relevant rule for dismissal under FRCP 21 when citing *Lenon v. St. Paul Mercury Ins. Co.*, 136 F.3d 1365 (10th Cir. 1998). (Motion to Dismiss, ¶20.) In *Lenon*

1 the Court held that a party may be dismissed by the Court in order to preserve diversity, if the
2 party is dispensable. *Id.*

3 Similar to a motion to dismiss under FRCP 12 (c), the motion to dismiss under FRCP 21
4 should be based upon the facts pled in the Complaint. *See Aldabe v. Aldabe*, 616 F.2d 1089, 1093
5 (9th Cir. 1980). Accordingly, the Court must assume the truth of all the material facts pled in
6 Plaintiff's Complaint and determine if Sallie Mae is entitled to dismissal as a matter of law. *Hal*
7 *Roach Studios v. Richard Feiner & Co., Inc.*, 896 F.2d. 1542, 1550 (9th Cir. 1989).
8

9 **B. Sallie Mae is a Necessary Party to this Action**

10 The Court cannot dismiss Sallie Mae, because Plaintiff has alleged that Sallie Mae is an
11 interested party which holds an interest in his student loans. (Am. Compl. ¶¶ 22, 32, 44.) Sallie
12 Mae contends that it may be dismissed from this case because it is not a holder of the loans, and
13 because it assigned its interest to USAF. (Motion to Dismiss, ¶13; Decl. Petra Shipman, ¶5.)

14 As either the holder of the loans or the service, Sallie Mae has the ability to recognize
15 Plaintiff's loan obligation as discharged. Dismissing Sallie Mae will cause prejudice to Plaintiff,
16 because it may be possible for Sallie Mae to continue pursuing the debt if it is dismissed.
17 Further, because Sallie Mae admits that it is the servicer of the student loans (Decl. Petra
18 Shipman, ¶6.), it holds much of the key evidence, facts, documents, knowledge, witnesses and
19 more needed by Plaintiff in pursuing 11 U.S.C. §523(a)(8) discharge action.

20 Because the holders, guarantors, and servicers of a loan act in unison to effectively
21 demand and collect payments under a loan, they all are indispensable parties in an action seeking
22 a determination of dischargeability of student loans. Thus, dismissing Sallie Mae would unduly
23 prejudice Plaintiff, and this Court should deny Sallie Mae's Motion to Dismiss.
24

25 **C. Sallie Mae's Status as a Holder of the Loans is a Disputed Fact**

26 Even if the issue of whether Sallie Mae is a holder of the loans is relevant, Sallie Mae's
27 status as the holder of the loans is a disputed material fact. Should the Court look beyond the
28 pleadings as requested by Sallie Mae, it will see that Sallie Mae admits that it is the servicer of

1 the loans. (Decl. Petra Shipman, ¶6.) Outside of the self-serving declaration of Petra Shipman,
2 Sallie Mae has not produced a single shred of evidence to show that it is not a holder or
3 guarantor of Plaintiff's student loans. Sallie Mae has given insufficient evidence to contradict the
4 allegations in the Amended Complaint. Because there is a dispute of material fact, this Court
5 cannot dismiss Sallie Mae as a matter of law and this Court should deny the Motion to Dismiss.

6
7 **III. Conclusion**

8 For the reasons above, Plaintiff respectfully requests the Court deny Sallie Mae's motion
9 to dismiss itself from this case. Furthermore, the Plaintiff moves the court to reinstate all
10 previously pending motions brought by Plaintiff, that the court recently removed off calendar
11 unilaterally, until a final settlement is reached between all the remaining parties or the loan is
12 otherwise discharged.

13
14
15 Dated: April 15, 2014

MCMILLAN LAW GROUP

16
17 By: /s/ Julian McMillan
18 Julian McMillan, Esq.
19 Attorney for Zxelan Richard Bonn
20
21
22
23
24
25
26
27
28